Supreme Court, U.S.
FILED
JUN 10 1993
OFFICE OF THE CLERK

92-1966

NO:

in the Supreme Court of the United States

OCTOBER TERM, 1993

SCOTT NICHOLAS ERRICO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FLORIDA COURT ERRONEOUSLY CONSTRUED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT TO ALLOW A STATEMENT UNLAWFULLY OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION TO BE RELIED ON IN SECURING PETITIONER'S CONVICTION

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PREFACE

The following references will be used by Petitioner:

(Tr. Vol.) - Trial Transcript
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OPINION BELOW

The Opinion of the Florida District Court of Appeal, Fourth District, No. 91-1106, in this cause is reprinted in the Appendix to this Petition at App. 1. The case is reported at 608 So.2d 930 (4th DCA 1992), cert. denied.

JURISDICTION

The decision sought to be reviewed by Writ of Certiorari was rendered November 18, 1992. Petition for Review was denied by Order of the Supreme Court of Florida issued March 17, 1993. Title 28 U.S.C § 1254(1) is the statutory provision which confers jurisdiction on this Court to review the appellate decision in question.

CONSTITUTIONAL PROVISIONS

The issue herein concerns the Fifth and Fourteenth Amendments to the United States Constitution:

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws . . .

STATEMENT OF THE CASE

A. Course of Proceedings

On January 23, 1985, a grand jury sitting in Broward County, Florida, returned a four-count Indictment charging Petitioner and four (4) other individuals with two counts of murder in the first degree and two counts of kidnapping. On March 4, 1988, Petitioner filed his Motion to Suppress Oral and Written Admissions, Statements and Alleged Confessions. (Tr. Vol. XX, 3008). In particular, Petitioner sought to suppress the post-arrest oral statements made by him to British officials in the United Kingdom. Petitioner made these statements after he had been held incommunicado for more than two days and interrogated repeatedly by the British officials. On July 5, 1990, a hearing was held on the Motion to Suppress. On July 7, 1990, the Motion to

Suppress was denied. (Tr. Vol. II, 298; Tr. Vol. XX, 3066).

On July 10, 1990, Petitioner's first trial began. On August 3, 1990, a mistrial was declared when the jury indicated its inability to arrive at a verdict. (Tr. Vol. XXI, 3162). The parties later determined the jurors had deadlocked at eleven to one in favor of acquitting Appellant of all charges. (Tr. Vol. XXI, 3166).

On January 8, 1991, Appellant's second trial began. Evidence was adduced at trial that on numerous occasions while being interrogated by the British officials, and before he gave an incriminating statement, Petitioner had repeatedly refused to answer questions and requested to have legal counsel present. (Tr. Vol. I, 79-81, 132, 135). On January 30, 1991, the jury returned its verdict of

guilty on both Counts of First Degree Murder. (Tr. Vol. XVIII, 2801).

The Florida District Court of Appeal, Fourth District found no error in the denial of Petitioner's Motion to Suppress and Petitioner's convictions were affirmed. Errico v. State, 608 So.2d 930 (4th DCA 1992), cert. denied, ___So.2d___, (Fla. 1993).

B. Facts

On September 5, 1985, Petitioner, a United States citizen, was detained at Heathrow Airport, London, England, by British law enforcement officials from Scotland Yard.[1] In the airport, the British officials searched Petitioner's luggage and found two "flick knives" (switch blades). Petitioner was formally

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[1] At the hearing on Petitioner's Motion to Suppress, the British officials admitted that Petitioner's arrest was pretextual.

placed under arrest and placed in a cell at Heathrow Airport.

Petitioner was held incommunicado for approximately fifty-five (55) hours during which time he was subjected to repeated interrogation by the British officials. During this period of time, Petitioner requested counsel on approximately thirty-seven (37) separate occasions and made several explicit requests that the interrogations cease.

On the second day of Petitioner's custody, the British officials contacted the Federal Bureau of Investigation and discovered Petitioner's true identity, (based on a passport found in his luggage) and that he was a fugitive from the United States on murder and kidnapping charges.

As the interrogation resumed, Petitioner replied "I request legal counsel" in response to each of the

questions posed by the British officials. Petitioner was advised that he could be detained and held incommunicado for ninety-six (96) hours at which time the British officials could apply to the court to permit additional incommunicado inquiry periods of up to seventy-two (72) hours.

The British officials then questioned Petitioner about the matters for which Petitioner was wanted in the United States. In response, Petitioner finally succumbed to his inquisitors and made certain highly inculpatory statements concerning the crimes for which he was indicted. These statements were admitted in evidence at Petitioner's trial and formed the basis for his conviction.

REASONS FOR GRANTING THE WRIT

WHETHER THE FLORIDA COURT ERRONEOUSLY CONSTRUED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT TO ALLOW A STATEMENT UNLAWFULLY OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION TO BE RELIED ON IN SECURING PETITIONER'S CONVICTION

The Florida District Court of Appeal, Fourth District, has decided a question of law in direct conflict with the decisions of this Court in Bram v. United States, 168 U.S. 532, 18 S.Ct. 183 (1897) and Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964).

In Bram, two murders were committed aboard a United States ship en route to South Africa. Id. at 194. Bram, one of the individuals suspected of being responsible for the murders, was taken ashore at Halifax, Nova Scotia, where he was thoroughly interrogated regarding the

murders. Id. at 194. The police officers conducting the interrogation were from Halifax. Id. at 194. The Court held that the confession was involuntary, and accordingly, it should not have been allowed in evidence at Bram's trial in the United States. Id. at 195.

Petitioner, like Bram, made involuntary statements to foreign officials and at trial in the United States, these statements were relied upon by the prosecution to secure Petitioner's conviction. The Supreme Court observed the following in reversing Bram's conviction as a result of the erroneous admission of the coerced confession:

> In the case before us we find that an influence was executed, and, as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that an error was committed by the trial court in admitting the confession under

> the circumstances disclosed in the record.

Bram, 18 S.Ct. at 195. [emphasis added].

There was no question that Petitioner's statements were obtained through highly coercive circumstances and would have clearly been inadmissible if obtained by any State or Federal law enforcement officer in the United States. The circumstances of Bram are virtually indistinguishable from those instanter. In both cases, foreign officials used improper and coercive interrogation techniques to compel a confession from the accused. Consequently, it is clear that the same result in Bram is mandated here.

The District Court of Appeal of Florida, Fourth District, ignored this Court's precedents and instead improperly relied on a series of clearly distinguishable and/or inapplicable

decisions in holding that the denial of Petitioner's Motion to Suppress was proper: United States v. Mitro, 880 F.2d 1480 (1st Cir. 1989) (case turned on the Fourth Amendment not the Fifth and Sixth Amendments); United States v. Rosenthal, 793 F.2d 1214, opinion modified, 801 F.2d 378 (11th Cir. 1986) (case concerned Fourth Amendment rights, not Fifth and Sixth Amendment rights); United States v. Martindale, 790 F.2d 1132 (4th Cir. 1986) (defendant "readily agreed" to interrogation conducted in "cordial" manner free from coercion or duress); United States v. Covington, 783 F.2d 1052 (9th Cir. 1985) (remanded to determine if confession comported with due process); United States v. Morrow, 537 F.2d 120 (5th Cir. 1976) (case turned on Fourth Amendment law and not the Fifth Amendment); United States v. Molina-

Chacon, 627 F.Supp. 1253 (E.D.N.Y. 1986) (statements clearly voluntary and clearly satisfied due process).

The District Court of Appeal of Florida, Fourth District, ignored applicable precedent from this Court which held that a defendant's Fifth Amendment rights are violated where statements, coerced in a foreign jurisdiction, are relied upon to secure a defendant's conviction. See Bram, 168 U.S. 532, 18 S.Ct. 183 (1897).

In Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964), the Supreme Court recognized that the holding in Bram applied to the states through the Fourteenth Amendment. (See Withrow v. Williams, ___ U.S.___, 113 S.Ct. 1745, 1751 (1993)). "The American system of criminal prosecution is accusatorial, not inquisitorial" and "the Fourteenth

Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement - the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty. . . for such silence." Malloy, 84 S.Ct. at 1493-94.

This very term, this Court recognized the continued viability of this cornerstone principle of law in Withrow v. Williams, ___ U.S.___, 113 S.Ct. 1745 (1993), a police officer threatened to "lock up" the defendant during a station house interrogation causing the defendant to make inculpatory statements regarding a double murder. Although, in Withrow, the Court expressed no opinion on the merits of the defendant's involuntariness claim, the Court reaffirmed the principles in Bram and Malloy that involuntary and

coerced confessions made in response to custodial interrogations are not admissible at the time of trial. Withrow, 113 S.Ct. at 1749, 1751, 1753, 1756.

The opinion of the Florida District Court of Appeal, Fourth District is clearly in conflict with Bram, 168 U.S. 532, 18 S.Ct. 183 (1897) and Malloy, 378 U.S. 1, 84 S.Ct. 1489. Accordingly, this case should be reviewed by this Honorable Court in order to address this important issue of criminal jurisprudence, resolve this conflict, and restore Petitioner's constitutional rights.

CONCLUSION

Petitioner has been denied basic fundamental rights guaranteed by the United States Constitution and seeks relief in this Court to restore those rights. This issue is capable of repetition, particularly as international

law enforcement and cooperation between the United States and Foreign governments becomes more frequent in a world which shrinks every day. Based on the arguments and authorities cited herein, Petitioner, Scott Nicholas Errico, respectfully requests this Honorable Court to grant this Petition for Writ of Certiorari, reverse the Petitioner's conviction, and for such other relief as is just and proper.

Respectfully submitted,

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Scott Nicholas ERRICO, Appellant,

v.

STATE of Florida, Appellee.

No. 91-1106.

District Court of Appeal of Florida,
Fourth District.

Nov. 18, 1992.

Defendant was convicted in the Circuit Court for Broward County, Stanton S. Kaplan, J. Defendant appealed. The District Court of Appeal held that admission of evidence made to codefendant was not a violation of defendant's Sixth Amendment rights.

Affirmed.

Joel Hirschhorn and Robert M. Einhorn of Joel Hirschhorn, P.A., Coral Gables, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Carol Cobourn Asbury,

Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Affirmed. In London the appellant, a United States citizen, was taken into custody and questioned by airport authorities and Scotland Yard detectives. He contends that several of his Fifth and Sixth Amendment rights were violated in the course of his interrogation. Upon a review of the record, we find no error in the denial of appellant's motion to suppress. United States v. Mitro, 880 F.2d 1480 (1st Cir. 1989); United States v. Rosenthal, 793 F.2d 1214, opinion modified, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987); United States v. Martindale, 790 F.2d 1129 (4th Cir.), cert. denied, 479 U.S. 855, 107 S.Ct. 193, 93 L.Ed.2d 125 (1986); United States v.

Covington, 783 F.2d 1052 (9th Cir.), cert. denied, 479 U.S. 831, 107 S.Ct. 117, 93 L.Ed.2d 64 (1986); United States v. Morrow, 537 F.2d 120, reh'g denied, 541 F.2d 282 (5th Cir. 1976), cert denied, 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977); United States v. Molina-Chacon, 627 F.Supp. 1253 (E.D.N.Y. 1986).

We also find no error in the admission of evidence concerning appellant's statements made to a codefendant during the time they were held in nearby cells while awaiting trial. There is no evidence of any advance arrangement between the authorities and the codefendant or of any state action designed to elicit incriminating statements from appellant. See Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Even though he questioned the "coincidence" of his being placed in the same maximum security "pod,"

as his codefendant, the appellant has not demonstrated a violation of his Sixth Amendment rights as set forth in Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) and United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). Additionally, we find no violation of appellant's Sixth Amendment rights during voir dire. Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990), cert. denied, ___ U.S.___, 111 S.Ct. 2045, 114 L.Ed.2d 129 (1991).

GUNTHER and STONE, JJ., and MOE, LEROY H., Associate Judge, concur.

SUPREME COURT OF FLORIDA

WEDNESDAY, MARCH 17, 1993

CASE NO. 80,976

District Court of Appeal,
Fourth District

91-1106

SCOTT NICHOLAS ERRICO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, MCDONALD, SHAW, GRIMES and KOGAN, JJ., concur.

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

Supreme Court, U.S.
FILED
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No: 92-1966

IN THE

Supreme Court of the United States

October Term, 1993

SCOTT NICHOLAS ERRICO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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QUESTION PRESENTED FOR REVIEW

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PREFACE

The following reference will be used by Respondent:

(R) - Record on Appeal

OPINION BELOW

The Opinion of the Florida District Court of Appeal, Fourth District, No. 91-1106, in this cause is reprinted in the Appendix to Petitioner's Petition at App. 1. The case is reported as *Errico v. State,* 608 So. 2d 930 (4th DCA 1992), *rev. denied,* 617 So. 2d 319 (Fla. 1993).

STATEMENT OF THE CASE

Respondent accepts Petitioner's "Course of Proceedings," but not the remainder of his Statement of the Case.

Britain's Scotland Yard was involved in investigating the Brinks-Mat gold bullion robbery involving 26 million dollars which occurred in London in 1983. (R. 5, 30, 51, 182, 265, 269, 272). That investigation also involved the murder of a British police officer. (R. 182). In 1985, Patrick Diamond was the focus of the British police investigation into the gold bullion robbery. (R. 4, 185). The British police believed that Patrick Diamond was laundering monies for at least one of the persons involved in the Brinks-Mat gold bullion robbery (R. 4, 51, 183). The police also suspected Patrick Diamond of being involved in international money laundering operations (R. 36, 183).

As a result of the surveillance of Patrick Diamond, the British police became aware of Petitioner (R. 51, 181). Petitioner met with Patrick Diamond in London on a fairly constant basis for two days. (R. 32, 46, 53, 185). The police learned that Petitioner's name was Stephen Marzovilla. Scotland Yard requested information on Marzovilla from the United States Embassy. There was no information. (R. 54, 185). However, Scotland Yard was aware that Petitioner was traveling extensively throughout the world. (R. 186). Petitioner requested money from Patrick Diamond, who lived on the Isle of Man. The money was transferred from the Isle of Man in such a devious way that the police could not pin point where Petitioner was staying. (R. 186). The fact that Petitioner was traveling around the world and monies were being transferred to him caused Scotland Yard to conclude that Stephen Marzovilla was not Petitioner's true identity. (R. 186).

While in England, Petitioner visited Patrick Diamond's mother. (R. 55). After that, Petitioner went to several safety deposit boxes. (R. 54-55). Petitioner was associating with "top flight London criminals." (R. 55). Scotland Yard discovered that Petitioner would be traveling to Spain. There he was to meet a London criminal who was suspected of being involved in the Brinks robbery. (R. 187). Scotland Yard ordered two officers to approach Petitioner at Heathrow Airport in hopes of determining his true identity. (R. 188).

The officers stopped Petitioner in Heathrow Airport. (R. 5, 6). Petitioner carried a passport identifying him as Stephen Marzovilla. (R. 6). He agreed to have his luggage searched. (R. 10, 21, 35). Two "flick knives" or switchblades were found in a hidden pocket in Petitioner's wash bag. (R. 11, 23, 36). The flick knives are illegal in Britain (R. 36). Petitioner was arrested for the possession of the illegal flick knives. (R. 276). Petitioner had a substantial amount of money on him at the time of the arrest — about $14,000. (R. 62-63).

At the same time, Scotland Yard obtained search warrants for the safety deposit boxes which Petitioner had visited. (R. 57). Located in the safety deposit boxes was approximately $100,000 and a passport along with other identification bearing Petitioner's photograph identifying him as Craig Jacobs. (R. 58, 60, 190-191, 265-268). After further inquiries were made through the FBI representative in London Embassy, the British police found out that Craig Jacobs was the alias of a man by the name of Errico. (R. 191).

Under British law, the police were allowed to stop and search Petitioner and his luggage if there was "reasonable suspicion" that he was involved in some illegal conduct. (R. 7, 10, 16, 27). In the instant case, the British police had "reasonable grounds" to believe that Petitioner committing a crime based on the information noted above. In England, the police can stop anyone to ask who they are, what they

are doing, where they are going, and to ask for identification. (R. 41-43). Furthermore, under British Law, police have the right to stop and search anybody for any reason in the airport without their consent. A person can avoid the search only by leaving the airport. (R. 49).

Upon his arrest at Heathrow Airport, Petitioner was given "Cautionary Warning." (R. 11). The Cautionary Warning informs a person that he is not obliged to say anything unless he wishes to do so, and that anything he does say will be written down and may be used as evidence. (R. 11, 12, 116).

The police who gave Petitioner the Cautionary Warning told him that the Cautionary Warning was similar to *Miranda*[1] warnings in the United States. (R. 11, 114, 116). However, there is nothing in the Cautionary Warning or in the British law that says a detainee has a right to counsel. (R. 116).

Scotland Yard learned from the FBI that Petitioner was wanted for murder and serious drug related matters in the United States. Petitioner was then questioned regarding his true identity and whether Petitioner would be willing to provide fingerprints voluntarily in order to confirm his identity (R. 77-81). Although Petitioner indicated that he did not wish to speak to the police without an attorney, under British law the police can continue to ask questions even though the defendant does not wish to answer. (R. 75-76). Petitioner was told that due to the seriousness of the charges he would not be allowed unsupervised access to an attorney. Petitioner would ordinarily have been brought before the court within 72 hours, but since there was no court on the weekend he was not brought to court until Monday morning. (R. 112). At that time he had a lawyer. (R. 218).

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1 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Scotland Yard Detective Lundy testified that under British law he was entitled to deny a defendant access to a solicitor if he believed that a lawyer would interfere with the administration of justice. (R. 194, 236-237). In the instant case, Lundy was anxious to find out anything he could which pertained to the British end of the operation and, in particular, to Patrick Diamond. (R. 195). Lundy did not want Diamond to find out that the British Police had arrested Petitioner. (R. 195). Had the police given Petitioner an attorney at the early stages, chances were that Diamond would have found out about the arrest through the attorney and vast sums of money would be taken out of the jurisdiction. (R. 196). The result would have been the obstruction of, and interference with, the process of the investigation (R. 195-196). Denial of access to an attorney can be challenged by the defendant in British courts. So it is not a decision that a police officer makes lightly. (R. 197).

Petitioner was interviewed regarding his travels in other countries. (R. 97, 210). On the same day, Petitioner was charged with the possession of forged passports. (R. 97, 210). Petitioner asked to speak with Lundy. Petitioner stated that he wished to come to an "agreement" [plea bargain] with the British Police. (R. 88, 204). Lundy told Petitioner that he would have to tell the police about all the crimes in Britain and the United States if he wanted to plea bargain. (R. 94, 204). The police's primary concern was the Brinks-Mat robbery and information Petitioner may have concerning that robbery. (R. 290). Petitioner said that he would think about it. (R. 94, 205).

Lundy informed Petitioner that Scotland Yard knew his true identity and that he was wanted for homicide and drug related offenses. The British police officer explicitly stated that he wanted to know what Petitioner was doing in the United Kingdom, and how he fit in with the drug trade in Britain. (R. 88). Petitioner admitted that he was involved in

the drug trade but refused to name names or give specifics about his business interests in England. (R. 89, 90, 122).

The police did not ask any questions about the crimes Petitioner was allegedly involved in in the United States. In addition, there were no American officials present during any of the interviews. (R. 148-208). No threats were used and Petitioner understood what was going on. (R. 96). Lundy testified that the primary concern of his investigation was the Brinks-Mat robbery and the related murder of a police officer. (R. 224, 276).

No questioning was conducted for, or on behalf or at the request of, any officials from the United States government. (R. 87, 290). Lundy only pursued matters related to crimes in England. (R. 228, 230). Lundy reminded Petitioner that he was under caution. (R. 210). Petitioner asked Lundy what the British police wanted from him. Lundy answered that they wanted to know what Petitioner was doing in England. (R. 211). Petitioner admitted that the case was strong against him. He hoped to plead to the marijuana trafficking charge to avoid the murder charges. (R. 212). Petitioner admitted that he was involved in a marijuana trafficking operation (R. 212-213). The murders, according to Petitioner, were part of his involvement in the marijuana drug trade. (R. 214).

In a later interview, Petitioner again admitted his involvement in the drug trade. (R. 99). He stated that his involvement in the drug trafficking trade did not extend to the United Kingdom. (R. 100).

Petitioner was later interviewed in the presence of his solicitor, Trevor Hamlyn. (R. 101, 218). By this time, Petitioner's identity had been positively confirmed. (R. 102, 218). The police reminded Petitioner that he was wanted in the United States on various criminal matters. (R. 102, 218). Petitioner replied, "No comment." (R. 102, 218). Petitioner

refused to comment on any of the questions related to the indictments in the United States or his involvement with Patrick Diamond or companies in the Isle of Man. (R. 104-105).

Respondent specifically rejects Petitioner's claim that these references regarding the United States crimes made to British authorities "formed the basis for his conviction." Petitioner would have been convicted even in the absence of these few and fleeting statements. Overwhelming evidence of guilt was presented at Petitioner's trial.

REASONS FOR DENYING THE WRIT

THE FLORIDA COURT DID NOT ERRONEOUSLY CONSTRUE THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND THE STATEMENT OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION WAS PROPERLY ADMITTED INTO EVIDENCE AT PETITIONER'S TRIAL.

Contrary to Petitioner's assertions, the opinion of the Florida Fourth District Court of Appeal is not in direct conflict with *Bram v. United States,* 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897) and *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). There is certainly no conflict with *Malloy v. Hogan,* which merely holds that the Fifth Amendment extends to the states through the Fourteenth Amendment. Moreover, *Bram v. United States* deals with a coerced confession, and not a violation of *Miranda,* and is factually distinguishable from the case at bar. After an analysis of the applicable law, the court in *Bram* summarized the factual circumstances as follows:

> The crime had been committed on the high seas. Brown, immediately after the homicide, had been arrested by the crew in consequence of suspicion aroused against him, and had been by them placed in irons. On reaching port, these two suspected persons were delivered to the custody of the police authorities of Halifax and were then held in confinement awaiting the action of the United States consul, which was to determine whether the suspicions which had caused the arrest justified the

sending of one or both of the prisoners into the United States for formal charge and trial. Before the examination had taken place the police detective caused Bram to be brought from jail to his private office, and when there alone with the detective he was stripped of his clothing, and either whilst the detective was in the act of so stripping him, or after he was denuded, the conversation offered as a confession took place. The detective repeats what he said to the prisoner, whom he had thus stripped, as follows:

"When Mr. Bram came into my office I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' "

The fact, then, is, that the language of the accused which was offered in evidence as a confession was made use of by him as a reply to the statement of the detective that Bram's cosuspect had charged him with the crime, and, although the answer was in the form of a denial, it was doubtless offered as a confession because of an implication of guilt which it was considered to mean. But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrows any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, no only is the claim that the statement was voluntary over-

> thrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

168 U.S. at 561-562, 18 S.Ct. at ____, 42 L.Ed. at 580. (emphasis in original).

* * *

> Moreover, aside from the neutral result arising from the situation of the accused and the communication made to him by the detective, the conversation conveyed as express intimation rendering the confession involuntary within the rule laid down by the authorities. What further was said by the detective?
>
> " 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.'" But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to

> be removed by speaking naturally imported a suggestion of some benefit as to the crime and its punishment as arising from making a statement.

168 U.S. at 564-565, 18 S.Ct. at ___, 42 L.Ed. at 581.

Bram is dissimilar to the instant case. At bar, there was absolutely no physical or mental coercion which was so clearly present in *Bram*. Further, in *Bram* the authorities were detaining and questioning the defendant on behalf of the United States. The investigation was of an American citizen regarding a crime committed in American territory.

Contrast the facts here, where British police officers, in strict compliance with British law, and comporting with due process, questioned Petitioner regarding British crimes. Incident to this questioning, very limited concessions of involvement in criminal activities in the United States were made by Petitioner. These minor concessions, contained in Respondent's Statement of the Case, comprised only a small portion of the evidence of guilt presented by Florida during Petitioner's trial.

Petitioner's argument, taken to its logical extension, is that the rights provided to United States citizens pursuant to *Miranda* must extend worldwide to all foreign jurisdictions. Such is certainly not the case. *Miranda* rights are merely a rule of law interpreting the United States Constitution and are not fundamental. *McNeil v. Wisconsin,* 501 U.S. ___, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). This court has even applied a harmless error analysis to the admission at trial of a coerced confession. *Arizona v. Fulminante,* 499 U.S. ___, 111 S.Ct. 1246, 113 L.Ed.2d 302, *rehearing denied* ___ U.S. ___, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991).

Petitioner's statements in Britain were obtained in strict conformity with British law. Excluding these statements in Petitioner's Florida trial would not serve the purpose of the

exclusionary rule which is to deter future police misconduct. Exclusion of the statements in a Florida court would have no effect on future actions of British police officers in the investigation of British crimes. Justice White has written:

> [A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness.

Illinois v. Gates, 462 U.S. 213, 257-58, 103 S.Ct. 2317, 76 L.Ed.2d 527, 561 (1983) (White, J., concurring in the judgment). See also, *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82, L.Ed.2d 677, *rehearing denied* 468 U.S. 1250, 105 S.Ct 52, 82 L.Ed.2d 942 (1984).

Petitioner's case is quite different from *Bram.* Thus, the holding below does not conflict with *Bram.* The decision below turns on its own unique facts, which are not likely to be repeated. The decision will affect few, if any, other litigants. There is no need for this court to review the merits of Petitioner's case.

CONCLUSION

As the decision below does not conflict with any decision of this Court, Florida respectfully requests that this Court decline to accept jurisdiction in this case.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 22 1993
OFFICE OF THE CLERK

NO: 92-1966

in the Supreme Court of the United States

OCTOBER TERM, 1992

SCOTT NICHOLAS ERRICO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FLORIDA COURT ERRONEOUSLY CONSTRUED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT TO ALLOW A STATEMENT UNLAWFULLY OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION TO BE RELIED ON IN SECURING PETITIONER'S CONVICTION

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PREFACE

The following references will be used by Petitioner:

(Opp.) - State's Opposition Brief

(Pet.) - Petition for Writ of Certiorari

(R.) - Record on Appeal (Petitioner's Second Trial)

(Supp.) - Pre-trial Motion to Suppress Hearing

(Tr.) - Petitioner's First Trial

REASONS FOR GRANTING THE WRIT

WHETHER THE FLORIDA COURT ERRONEOUSLY CONSTRUED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT TO ALLOW A STATEMENT UNLAWFULLY OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION TO BE RELIED ON IN SECURING PETITIONER'S CONVICTION

In an unavailing effort to distinguish Bram v. United States, 168 U.S. 532, 18 S.Ct. 183 (1897) from the instant case, Respondent seeks to frame the issue before the Court as one involving a violation of Miranda.[1] Respondent states:

> ...Bram v. United States deals with a coerced confession, and not a violation of Miranda, and is factually distinguishable from the case at bar.

(Opp. 8). Contrary to Respondent's argument, neither Bram nor the instant

---

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

case involve a claim of a Miranda violation per se. Petitioner has never advanced the argument attributed to him by Respondent that "Miranda must extend worldwide to all foreign jurisdictions." (Opp. 11). Petitioner recognizes that the British Officials conducting the interrogation in this case were not bound by Miranda, although the Officials did mislead Petitioner into believing that the United Kingdom "caution" was the "same as" Miranda. (R:11); (Supp.24).

It is undisputed that Petitioner requested counsel at least thirty-seven (37) times during the course of his two and one-half (2-1/2) day interrogation by British Officials. However, Respondent completely misses the point in this regard. Petitioner's repeated requests for counsel and repeated requests that the interrogation cease, are compelling

evidence demonstrating, not only a Miranda violation (were the interrogation on United States soil by United States law enforcement officials), but that Petitioner's inculpatory statements were not given freely or voluntarily and as such, the interrogation and use of the statements violated the Fifth Amendment. As in Bram, the inculpatory statements were the product of mental duress and coercion. Thus, Petitioner's Fifth Amendment rights were violated when his coerced statement was admitted at trial, over his objection.

Contrary to Respondent's argument, Bram cannot be meaningfully distinguished on a factual basis from the case at bar. Respondent states that "[a]t bar there was no physical or mental coercion which was so clearly present in Bram." (Opp. 11). Respondent's position is in direct

conflict with the record in this case. In fact, the interrogation tactics and mental coercion employed by the British Officials, instanter, were far more odious than those utilized by the foreign officials in Bram.

Sub judice, Petitioner, prior to his arrest, clearly indicated that he had no intention of making any statement to the British Officials. (R:2045-49). From the beginning of the post-arrest interrogation period, Petitioner refused to answer any and all questions and responded to each question asked by the British officials with a specific request for legal counsel. (R:2063-65).

Petitioner verbally requested counsel on approximately thirty-seven (37) separate occasions and made several explicit requests that the interrogations cease. Detective Superintendent of

Scotland Yard, Anthony Lundy, explained to Petitioner that if he were afforded counsel, the consultation would be supervised by a British Official. (R:2067). This statement caused Petitioner a great deal of confusion because he was provided, and he signed, two (2) separate forms throughout the interrogation period which, he believed, entitled him to consult with a lawyer in private. (R:2147-49). In fact, the "forms" Petitioner had signed were virtually useless since, unbeknownst to him, the law entitling him to counsel did not take effect until three (3) months later. (R:2176-77).

Petitioner's confusion heightened and the coercive environment intensified when the Senior British Official, Lundy, told Petitioner that his consultation with a lawyer, if permitted, would be

"supervised." (R:2067). British interrogating official Owen Griffin testified that Petitioner "should [have been] allowed to communicate with . . . [counsel] privately," and that he [Griffin] did not "know what Mr. Lundy was referring to there . . ." (R:2068) [emphasis added].

As the interrogation continued, Petitioner was advised that he could be held incommunicado for ninety-six (96) hours at which time the British officials could apply to the court for additional, successive incommunicado inquiry periods of up to seventy-two (72) hours each. (R:2068-69, 2182-83). Petitioner was never told when he would be permitted to consult a solicitor and/or appear before a magistrate. Thus, Petitioner believed that unless he "confessed," he could be

held incommunicado for an indefinite period of time.

After approximately fifty-five (55) hours of continuous and steadfast resistance to the interrogation, Petitioner succumbed to his inquisitors and made highly inculpatory statements concerning the crimes for which he was indicted in the United States. These statements were admitted in evidence, over objection, at Petitioner's trial and formed the basis for his conviction.

Petitioner's repeated requests for counsel and the intentional confusion created, and psychological coercion imposed, by the British Officials demonstrates a clearly coercive physical and psychological atmosphere. As a result, Petitioner's statements cannot possibly be considered to have been freely, knowingly and voluntarily made.

The Record does not support Respondent's assertion that Petitioner was questioned "regarding British crimes [and] . . . very limited concessions of involvement in criminal activities in the United States were made by Petitioner." (Opp. 11). In fact the opposite is true. At the pre-trial Motion to Suppress hearing, Petitioner's counsel questioned Detective Superintendent of Scotland Yard, Lundy about the motive, intent and purpose of his inquiries of Petitioner regarding United States crimes:

> Q: [By: MR. HIRSCHHORN] When you and Mr. Marzovilla-Errico were discussing plea bargain, you were really talking about the United States situation; weren't you?
>
> A: [By: DETECTIVE SUPERINTENDENT LUNDY] In the main, yes, because I had nothing much from the English end of it at the stage other than the two passports.

(Supp. 213) [emphasis added]. Thus, Lundy admitted that the purpose and focus of Petitioner's interrogation was related to Petitioner's criminal problems in the United States. (Supp. 214). Lundy further admitted that he asked Petitioner to tell him everything in relation to crimes both in the United Kingdom and in the United States to "get everything sorted out." (Supp. 211).

Moreover, Respondent's statement that "very limited concessions of involvement in criminal activities in the United States were made by Petitioner" is clearly incorrect. (Opp. 11). After fifty-five (55) hours of interrogation, Petitioner did make highly damaging statements regarding drug trafficking and murder allegations which can hardly be considered

a "very limited concession."[2] It is clear that this improper evidence played a significant role in the jury's ultimate decision to convict Petitioner.

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . .

Arizona v. Fulminante, 499 U.S. ___, 111 S.Ct. 1246, 1257 (1991) (citations omitted).

In Fulminante, this Court reaffirmed a defendant's right to a new trial as a result of the improper admission of a

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[2] During its deliberations, the jury requested a readback of British Official Griffin's testimony regarding his interview with Petitioner "where Mr. Errico's answer was I don't mind the 25 years. I probably will do 15 but the other thing is kind of final. And/or the answer that ends, quote, but I don't want to fry, unquote and the next question." (R:2787). Over defense objection, this portion of the Record was readback to the jury. (R:2788).

coerced murder confession. Fulminante, 111 S.Ct. at 1261. Here, the Respondent cites Fulminante for the proposition that this Court has applied a harmless error analysis to the admission at trial of a coerced confession. (Opp. 11). However, in the case at bar, as in Fulminante, the erroneous admission at trial of Petitioner's coerced confession was clearly not harmless.

In fact, Petitioner's first trial was declared a mistrial because the jurors had deadlocked at eleven (11) to one (1) in favor of acquittal on all charges. (Tr. Vol. XXI, 3162, 3166). At Petitioner's second trial, which is the subject matter of this Petition, the jury requested a readback of the coerced confession. It is clear that Petitioner's statements to the British officials were very important to the jury and Petitioner's conviction was

secured, in large part, by the highly inculpatory statements made by Petitioner to British Officials. Contrary to Respondent's position, these admissions cannot possibly be deemed harmless error under the circumstances of this case and the earlier trial.

The decision of the Florida District Court of Appeal, Fourth District, is in irreconcilable conflict with this Court's decisions in Bram v. United States, 168 U.S. 532, 18 S.Ct. 183 (1897) and Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964). Coercion and duress take many forms, some obvious, some subtle. All are invidious and inimicable to the Fifth Amendment. Whether a confession is obtained by a physical beating, Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936), by playing on one's emotions such as fear, Ashcraft v. Tennessee, 322 U.S.

143, 64 S.Ct. 921 (1944), or by utilizing sophisticated psychological "mind" games (as here), the result is the same, it is a coerced confession. Being held incommunicado for days, denied counsel despite repeated requests for same, and not knowing when he would be brought before a judicial officer, in totality Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2044 (1973), created a far more coercive atmosphere for Petitioner than that which existed in Bram.

CONCLUSION

In focusing on Miranda, Respondent has failed to correctly address the issue before the Court. Namely, whether a confession obtained by foreign law enforcement officials in a foreign land through improper influence, duress and coercion may be relied on in a court of law in the State of Florida to secure a

defendant's conviction. The Court below also failed to address that issue.

Petitioner's confession, which was clearly coerced and involuntary, ought not be admitted at a trial in the United States merely because the confession was obtained by foreign officials in a foreign land. The basis for exclusion of this evidence is not to deter improper police conduct by foreign officials (which would certainly be a futile effort on the part of this Court). Rather, the basis for exclusion is that coerced confessions are inherently unreliable. Fulminante, 111 S.Ct. at 1257-58.

Thus, the issue before this Court does not turn on the prophylactic rule set forth in Miranda. Rather, this issue turns on whether a clearly involuntary confession obtained in a foreign jurisdiction may be admitted at trial in a

court of law in the United States under the Fifth Amendment of the United States Constitution.

Bram and other precedent from this Court makes clear that the answer to this question is a resounding and unequivocal "no." It does not matter whether the involuntary confession is obtained by law enforcement officials in Detroit or Dallas, Columbia or Canada, or as here, in the United Kingdom. The rule of law set forth in Bram is that regardless of where an accused's confession is obtained or by whom it is obtained, if it is an involuntary and coerced confession, the Fifth Amendment to the United States Constitution prohibits the admission of the confession in any court of law in the United States.

This Court should grant certiorari jurisdiction to resolve the conflict

between the instant case and this Court's prior precedent. The Court should reaffirm this important principle of Fifth Amendment law, restore Petitioner's constitutional rights, vacate Petitioner's convictions and direct that a new trial be held without the use of the Petitioner's involuntary confession.

Respectfully submitted,

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